2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 6

SEARCH AND SEIZURE/URINALYSIS

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Outline of Instruction

I. INTRODUCTION.

A. The Fourth Amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. The Fourth Amendment in the Military.

1. The fourth amendment applies to soldiers. *United States v. Stuckey*, 10 M.J. 347, 349 (C.M.A. 1981). *But see* Lederer and Borch *Does the Fourth Amendment Apply to the Armed Forces?*, 144 Mil. L. Rev. 110 (1994) (this article points out that the Supreme Court has never expressly applied the fourth amendment to the military).

2. The balancing of competing interests is different in military society. A soldier's reasonable expectation of privacy must be balanced against:

a. National security;

b. Military necessity (commander's inherent authority to ensure the safety, security, fitness for duty, good order and discipline of his command).

c. Effective law enforcement

3. The Military Rules of Evidence (Mil. R. Evid.) codify constitutional law.

a. Military Rules of Evidence which codify fourth amendment principles:

(1) Mil. R. Evid. 311, Evidence Obtained From Unlawful Searches and Seizures.

(2) Mil. R. Evid. 312, Body Views and Intrusions.

(3) Mil. R. Evid. 313, Inspections and Inventories in the Armed Forces.

(4) Mil. R. Evid. 314, Searches Not Requiring Probable Cause.

(5) Mil. R. Evid. 315, Probable Cause Searches.

(6) Mil. R. Evid. 316, Seizures.

(7) Mil. R. Evid. 317, Interception of Wire and Oral Communications.

b. Which law applies - recent constitutional decisions or the Military Rules of Evidence?

(1) General rule: the law more advantageous to the accused will apply. Mil. R. Evid. 103(a) Drafters' Analysis.

(2) Minority view: "These 'constitutional rules' of the Military Rules of Evidence were intended to keep pace with, and apply to the military, the burgeoning body of interpretive constitutional law . . . not to cast in legal or evidentiary concrete the Constitution as it was known in 1980." *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985).

(3) Some Military Rules of Evidence provide exceptions which permit application of recent constitutional decisions to the military. *See* Mil. R. Evid. 314(k) (searches of a type valid under the Constitution are valid in military practice, even if not covered by the Mil. R. Evid.).

II. LITIGATING FOURTH AMENDMENT VIOLATIONS.

A. Standing or "Adequate Interest."

1. General rule. To raise a violation of the fourth amendment, the accused's own constitutional rights must have been violated; he cannot vicariously claim fourth amendment violations of the rights of others.

a. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). Police seized sawed-off shotgun and ammunition in illegal search of car. Only owner was allowed to challenge admissibility of evidence seized. Defendant passenger lacked standing to make same challenge.

b. *United States v. Padilla*, 113 S. Ct. 1936 (1993). Accused lacked standing to challenge search of auto containing drugs driven by a conspirator in furtherance of the conspiracy, despite accused's supervisory control over auto.

2. Lack of standing is often analyzed as lack of a reasonable expectation of privacy. *See United States v. Padilla*, 113 S. Ct. 1936 (1993) and *United States v. Salazar*, 44 M.J. 464 (1996).

B. Motions, Burdens of Proof, and Standards of Review.

1. Disclosure by prosecution. Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused that it intends to offer at trial. Mil. R. Evid. 311(d)(1). See Appendix A for sample disclosure.

2. Motion by the defense. The defense must raise any motion to suppress evidence based on an improper search or seizure prior to entering a plea. Absent such a motion, the defense may not raise the issue later, unless permitted to do so by the military judge for good cause. Mil. R. Evid. 311(d)(2).

3. Burden of proof. When a motion has been made by the defense, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure or that some other exception applies. Mil. R. Evid. 311(e)(1).

   a. Exception. Consent. Government must show by clear and convincing evidence that the consent to search was voluntary. Mil. R. Evid. 314(e)(5).

   b. Exception. "Subterfuge" Rule. If the rule is triggered, the prosecution must show by clear and convincing evidence that the primary purpose of the government's intrusion was administrative and not a criminal search for evidence. Mil. R. Evid. 313(b).

4. Effect of guilty plea.

   a. A plea of guilty waives all issues under the fourth amendment, whether or not raised prior to the plea. Mil. R. Evid. 311(i).

   b. Exception: conditional guilty plea approved by military judge and consented in by convening authority. R.C.M. 910(a)(2).

5. Appellate Standard of Review. For Fourth Amendment issues, the standard of review for a military judge's evidentiary ruling is abuse of discretion. Abuse of discretion occurs if "[T]he military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (1995). "Erroneous view of the law" is defined as *de novo* review. *United States v. Owens*, 51 M.J. 204 (1999).

III. APPLICATION OF FOURTH AMENDMENT.

A. Nongovernment Searches. The fourth amendment does not apply unless there is a *government* invasion of privacy. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978)

1. Private searches are not covered by the fourth amendment.

a. Searches by persons unrelated to the government are not covered by the fourth amendment.

(1) *United States v. Jacobsen*, 466 U.S. 109 (1984). No government search occurred when federal express opened damaged package.

(2) *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988). United Parcel Service employee opened package addressed to accused as part of random inspection. Held: this was not a government search.

b. Searches by government officials not acting in official capacity are not covered by the fourth amendment. *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986). Search by military policeman acting in non-law enforcement role is not covered by fourth amendment.

c. Searches by informants are covered by the fourth amendment. *But see United States v. Aponte*, 11 M.J. 917 (A.C.M.R. 1981). Soldier "checked" accused's canvas bag and found drugs after commander asked soldier to keep his "eyes open." Held: this was not a government search because soldier was not acting as agent of the commander.

d. Searches by AAFES detectives are covered by fourth amendment. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990). Fourth amendment extends to searches by AAFES store detectives; *Baker* overrules earlier case law which likened AAFES personnel to private security guards.

2. Foreign searches are not covered by the fourth amendment.

a. Searches by U.S. agents abroad. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Fourth amendment does not apply to search by U.S. agents of foreigner's property located in a foreign country.

b. Searches by foreign officials.

(1) The fourth amendment is inapplicable to searches by foreign officials unless the search was "participated in" by U.S. agents. Mil. R. Evid. 311(c) and 315(h)(3).

(a) "Participation" by U.S. agents does not include:

(i) Mere presence.

(ii) Acting as interpreter.

(b) *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982). Fourth amendment did not apply to German search of off-post apartment, even though military police provided German's with information used.

(c) *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Military police officer participated in Panamanian search by driving accused to Army hospital, requesting blood alcohol test, signing required forms and assisting in administering test.

(2) A search by foreign officials is unlawful if the accused was subjected to "gross and brutal maltreatment." Mil. R. Evid. 311(c)(3).

B. No Reasonable Expectation of Privacy. The fourth amendment only applies if there is a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347 (1967) (the fourth amendment protects people, not places).

1. For the expectation of privacy to be reasonable:

a. The person must have an actual subjective expectation of privacy; and

b. Society must recognize the expectation as objectively reasonable.

2. Public view or open view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection." *Katz v. United States*, 389 U.S. 347 (1967).

a. Abandoned property. Mil. R. Evid. 316(d)(1).

(1) Garbage. *California v. Greenwood*, 486 U.S. 35 (1988). There was no expectation of privacy in sealed trash bags left for collection at curbside.

(2) Clearing quarters. *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). There was no reasonable expectation of privacy in blood stains found in quarters accused was clearing when accused removed majority of belongings, lived elsewhere, surrendered keys to cleaning team, and took no action to protect remnants left behind.

b. Aerial observation.

(1) *California v. Ciraolo*, 476 U.S. 207 (1986). Observation of a fenced-in marijuana plot from an airplane was not a search.

(2) *Florida v. Riley*, 488 U.S. 445 (1989). Observation of a fenced-in marijuana greenhouse from a hovering helicopter was not a search.

c. Peering into Automobiles. *United States v. Owens*, 51 M.J. 204 (1999). Peering into an open door or through a window of an automobile is not a search. *See also United States v. Richter*, 51 M.J. 213 (1999). If the car is stopped by a law enforcement official and then peered into, the investigative stop must be lawful.

d. The "passerby."

(1) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A. 1986). Peeking through a 1/8 inch by 3/8 inch crack in the venetian blinds from a walkway was not a search.

(2) *But see United States v. Kalisky*, 37 M.J. 105 (C.M.A. 1993). Security police's view through eight to ten inch gap in curtains in back patio door was unlawful search because patio was not open to public.

e. Private dwellings. *Minnesota v. Carter*, 119 S. Ct. 469 (1998). Cocaine distributors were utilizing another person's apartment to bag cocaine. The distributors were in the apartment for two and a half hours and had no other purpose there than to bag the cocaine. Supreme Court held that even though they were in private residence at consent of owner, they had no expectation of privacy in the apartment, and police discovery of their activity was not a Fourth Amendment search.

3. Plain view. Mil. R. Evid. 316(d)(4)(c).

a. General rule. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Fogg*, 52 M.J. 144 (1999). Property may be seized when:

(1) The property is in plain view;

(2) The person observing the property is lawfully present; and

(3) The person observing the property has probable cause to seize it.

b. "Inadvertence" is not required for plain view seizure. *Horton v. California*, 496 U.S. 128 (1990).

c. The contraband character of the property must be readily apparent. *Arizona v. Hicks*, 480 U.S. 321 (1987). Policeman lawfully in accused's home moved stereo receiver to see serial number and identify whether receiver was stolen; seizure was unlawful because the serial number was not in plain view.

d. Plain feel. Police may seize contraband detected through the sense of touch during a stop and frisk if its contraband nature is readily apparent. *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993). Police officer felt lump of cocaine in accused's pocket during patdown search and seized it. Seizure was held unconstitutional because the contraband nature of the lump was not "readily apparent."

4. Government computers/diskettes. *United States v. Tanksley*, 54 M.J. 169 (2000). No (or at least reduced) reasonable expectation of privacy in office and computer routinely designated for official government use. Seizure was lawful based on plain view.

5. E-mail/Internet.

a. *United States v. Maxwell*, 45 M.J. 406 (1996). Accused had reasonable expectation of privacy in electronic mail transmissions sent, received and stored in AOL computers. Like a letter or phone conversation, a person sending e-mail enjoys a reasonable expectation of privacy that police will not intercept the transmission without probable cause and a warrant.

b. *United States v. Monroe*, 52 M.J. 326 (2000). Accused did not have a reasonable expectation of privacy in e-mail mailbox in government computer which was the e-mail host for all "personal" mailboxes and where users were notified that system was subject to monitoring.

c. *United States v. Allen*, 53 M.J. 402 (2000). No warrant/authorization required for stored transactional records (distinguished from private communications). Inevitable discovery exception also applied to information sought by government investigators.

d. FBI's email surveillance system, Carnivore. In September and October 2000, House and Senate committees considered legality of Carnivore. The system consists of hardware box that is attached to internet service providers' equipment and searches for predetermined terms in email/user traffic with specially designed software. Legality as a search/ seizure tool has not been tested in any court.

6. Bank records.

a. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). No reasonable expectation of privacy exists in bank records. Even though records were obtained in violation of financial privacy statute, exclusion of evidence was inappropriate, because statute did not create fourth amendment protection.

b. *United States v. Dowty*, 48 M.J. 102 (1998). Servicemember may avail himself of the Right to Financial Privacy Act (RFPA), to include seeking federal district court judge to quash subpoena for bank records. However, Article 43, UCMJ statute of limitations is tolled during such litigation.

7. Enhanced senses. Use of "low-tech" devices to enhance senses during otherwise lawful search is permissible.

a. Dogs.

(1) *United States v. Place*, 462 U.S. 696 (1983). There is no expectation of privacy to odors emanating from luggage in a public place. "Low-tech" dog sniff is not a search (no fourth amendment violation).

(2) *United States v. Alexander*, 34 M.J. 121 (C.M.A. 1992). Dog sniff in common area does not trigger fourth amendment.

(3) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). Use of drug dogs at health and welfare inspection is permissible. Dog is merely an extension of human sense of smell.

(4) *See* AR 190-12, Military Working Dogs. Detector dogs are not to be used to inspect people.

b. Flashlights. *Texas v. Brown*, 460 U.S. 730 (1983). Shining flashlight to illuminate interior of auto is not a search.

c. Binoculars. *United States v. Lee*, 274 U.S. 559 (1927). Use of field glasses or binoculars is not a search.

d. Cameras. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Aerial photography with "commercially available" camera was not a search, but use of satellite photos or parabolic microphones or other "high-tech devices" would be a search.

e. Thermal Imaging Devices. *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), *cert. granted*, 121 S. Ct. 29 (2000). 9th Circuit ruled that police use of thermal imaging device without a warrant was proper. Heat source was lamps used for growing marijuana is private dwelling. The court found no reasonable expectation of privacy despite fact that information obtained was unavailable to naked eye.

8. Interception of wire and oral communications. Communications are protected by the fourth amendment. *Katz v. United States*, 389 U.S. 347 (1967).

a. One party may consent to monitoring a phone conversation.

(1) *United States v. Caceras*, 440 U.S. 741 (1979). A person has no reasonable expectation that a person with whom she is conversing will not later reveal that conversation to police.

(2) *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992). There is no reasonable expectation of privacy as to contents of telephone conversation after it has reached other end of telephone line.

(3) *United States v. Guzman*, 52 M.J. 218 (2000). There are still regulatory requirements for (one-party) consensual wiretapping but exclusion of evidence is not proper remedy except in cases where violation of regulation implicates constitutional or statutory rights.

b. The "bugged" informant. *United States v. Samora*, 6 M.J. 360 (C.M.A. 1979) There is no reasonable expectation of privacy where a "wired" informant recorded conversations during drug transaction.

c. Special rules exist for the use of wiretaps, electronic and video surveillance, and pen registers. Rules for video surveillance apply if "communications" are recorded

(1) A federal statute provides greater protections than the fourth amendment. 18, U.S.C. §§ 2510-21, 3117, and 3121-26 (1986).

(a) The statute prohibits the unauthorized interception of wire and oral communications. 18 U.S.C. § 2511 (1986).

(b) The statute contains its own exclusionary rule. 18 U.S.C. § 2515 (1986).

(c) The statute applies to private searches, even though such searches are not covered by the fourth amendment. *People v. Otto*, 831 P.2d 1178 (Cal. 1992).

(2) Approval process requires coordination with HQ, USACIDC and final approval from DA Office of General Counsel. *See* Mil. R. Evid. 317; AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986).

(3) An overheard telephone conversation is not an "interception" under the statute. *United States v. Parillo*, 34 M.J. 112 (C.M.A. 1992).

(4) See Clark, *Electronic Surveillance and Related Investigative Techniques*, 128 MIL. L. REV. 155 (1990).

9. Government property.

a. General rule. Mil. R. Evid. 316(d)(3) and Mil. R. Evid. 314(d).

(1) Normally a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. *United States v. Weshenfelder*, 43 C.M.R. 256 (1971).

(2) A reasonable expectation of privacy normally exists in personal-use items such as footlockers and wall lockers.

b. Government desks.

(1) *O'Connor v. Ortega*, 480 U.S. 709 (1987). Search of desk by employer, for "work-related" purpose, does not require probable cause or warrant.

(2) *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987). No expectation of privacy existed in locked government credenza when commander performed search for an administrative purpose.

(3) *United States v. Craig*, 32 M.J. 614 (A.C.M.R. 1991). No expectation of privacy existed in government desk at installation museum where search was conducted by sergeant major.

c. Barracks rooms.

(1) There generally is a reasonable expectation of privacy in items in a barracks room. *See* Mil. R. Evid. 314(d).

(2) *But see United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless intrusion and apprehension in barracks upheld. Court rules there is no reasonable expectation of privacy in barracks.

(3) *But see United States v. Curry*, 46 M.J. 733 (N.M. Ct. Crim. App. 1997) *aff'd* 48 M.J. 115 (1998) (per curiam). No need to read *McCarthy* so broadly: according to Navy Court, there is, instead, a *reduced* expectation of privacy.

(4) *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987). Drugs discovered during 0300 hours "inspection" in ship's berthing area and box near a common maintenance locker were admissible because there was no reasonable expectation of privacy in these areas.

(5) *United States v. Moore*, 23 M.J. 295, 299 (C.M.A. 1987) (Cox, J., concurring). "I am unable intellectually to harmonize the implicit assumption . . . that service members have legally enforceable expectations of privacy . . . in barracks rooms."

C. Open fields. The fourth amendment does not apply to open fields. Mil. R. Evid. 314(j).

1. *Hester v. United States*, 265 U.S. 57 (1924). Open fields are not "persons, houses, papers, and effects" and thus are not protected by the fourth amendment.

2. *United States v. Dunn*, 480 U.S. 294 (1987). Police intrusion into open barn on 198-acre ranch was not covered by fourth amendment; barn was not within "curtilage."

IV. AUTHORIZATION & PROBABLE CAUSE SEARCHES.

A. General Rule. A search is proper if conducted pursuant to a search warrant or authorization based upon probable cause. Mil. R. Evid. 315.

1. A search *warrant* is issued by a civilian judge; it must be in writing, under oath, and based on probable cause.

2. A search *authorization* is granted by a military commander; it may be oral or written, need not be under oath, but must be based on probable cause.

B. Probable Cause.

1. Probable cause is a reasonable belief that the … evidence sought is located in the place or on the person to be searched. Mil. R. Evid. 315(f). It is a "fluid concept … not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1982).

2. Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1982). Anonymous letter containing details which police corroborated provided probable cause.

a. Probable cause will clearly be established if informant is reliable (*i.e.* believable) and has a factual basis for his or her information under the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969).

b. Probable cause may also be established even if the *Aguilar-Spinelli* test is not satisfied. *Illinois v. Gates*, 462 U.S. 213 (1982). *But see United States v. Washington*, 39 M.J. 1014 (A.C.M.R. 1994). No probable cause existed to search accused's barracks room because commander who authorized search lacked information concerning informant's basis of knowledge and reliability.

c. *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Evidence that accused manufactured crack cocaine in his house gave probable cause to search accused's auto.

d. *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). Probable cause existed to search accused's quarters where commander was informed that contraband handguns had been delivered to the accused and the most logical place for him to store them was his quarters.

3. Staleness. Probable cause will exist only if information establishes that evidence is presently located in area to be searched. Probable cause may evaporate with the passage of time.

a. *United States v. Henley*, 53 M.J. 488 (2000). Magistrate's unknowing use of information over five years old was not dispositive. In addition, good faith exception applied to agents executing warrant.

b. *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988). Probable cause existed despite delay of two to six weeks between informant's observation of evidence of crime (firearm) in accused's car and commander's search authorization; accused was living on ship and had not turned in firearm to ship's armory.

c. *United States v. Agosto*, 43 M.J. 745 (A.F. Ct. Crim. App. 1995). Probable cause existed for search of accused's dormitory room even though 3 1/2 months elapsed between offense and search. Items sought (photos) were not consumable and were of a nature to be kept indefinitely.

4. *See* Appendix B for a guide to articulating probable cause.

C. Persons Who Can Authorize a Search. Mil. R. Evid. 315(d).

1. Any commander of the person or place to be searched ("king-of-the-turf" standard).

   a. The unit commander can authorize searches of:

      (1) Barracks under his control;

      (2) Vehicles within the unit area; and

      (3) Off-post quarters of soldiers in the unit if the unit is overseas.

   b. The installation commander can authorize searches of:

      (1) All of the above;

      (2) Installation areas such as:

         (a) On-post quarters;

         (b) Post exchange (PX);

         (c) On-post recreation centers.

   c. Delegation prohibited. *United States v. Kalscheur*, 11 M.J. 378 (C.M.A. 1981). Power to authorize searches is a function of command and may not be delegated to an executive officer.

   d. Devolution authorized. *United States v. Law*, 17 M.J. 229 (C.M.A. 1983). An "acting commander" may authorize a search when commander is absent. *See also United States v. Hall*, 50 M.J. 247 (1999). Commander may resume command at his discretion. Need not have written revocation of appointment of acting commander.

e. More than one commander may have control over the area to be searched. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992) (Crawford, J.). Three commanders whose battalions used common dining facility each had sufficient control over the parking lot surrounding facility to authorize search there.

2. A military magistrate or military judge may authorize searches of all areas where a commander may authorize searches. *See* chapter 9, AR 27-10, Military Justice (24 June 1996), for information on the military magistrate.

3. In the United States a state civilian judge may issue search warrants for off-post areas.

4. In the United States a federal civilian magistrate or judge may issue search warrants for:

a. off-post areas for evidence related to federal crimes; and

b. on-post areas.

5. Overseas a civilian judge may authorize a search of off-post areas.

D. Neutral and Detached Requirement. The official issuing a search authorization must be neutral and detached. See Mil. R. Evid. 315(d). *See also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (discusses four separate cases where commanders' neutrality was attacked).

1. A commander is not neutral and detached when he or she:

a. Initiates or orchestrates the investigation (has personal involvement with informants, dogs, and controlled buys).

b. Conducts the search.

2. A commander may be neutral and detached even though he or she:

   a. Is present at the search.

   b. Has personal knowledge of the suspect's reputation.

   c. Makes public comments about crime in his or her command.

   d. Is aware of an on-going investigation.

3. Alternatives. Avoid any potential "neutral and detached" problems by seeking authorization from:

   a. A military magistrate.

   b. The next higher commander.

E. **Reasonableness and the "Knock and Announce**." Even if based upon a warrant or authorization and probable cause, ***a search must be conducted in a reasonable manner***.

1. *Wilson v. Arkansas*, 514 U.S. 927 (1995). The common law requirement that police officers "knock and announce" their presence is part of the reasonableness clause of the fourth amendment.

2. *Richards v. Wisconsin*, 117 S.Ct. 1416 (1997) Every no-knock warrant request by police must be evaluated on a case by case basis. Test for no-knock warrant is whether there is reasonable suspicion that evidence will be destroyed or there is danger to police by knocking. *United States v. Ramirez*, 118 S.Ct. 992 (1998). Whether or not property is damaged during warrant execution, the same test applies – reasonable suspicion.

F. Reasonableness and Media "Ride-Alongs." Violation of Fourth Amendment rights of homeowners for police to bring members of media or other third parties into homes during execution of warrants. *Wilson v. Layne*, 119 S. Ct. 1692 (1999).

G. Seizure of Property.

1. Probable cause to seize. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape. Mil. R. Evid. 316(b). *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982). Probable cause existed to seize bloody clothing cut from accused's body during emergency room treatment.

2. Effects of unlawful seizure. If there is no probable cause the seizure is illegal and the evidence seized is suppressed under Mil. R. Evid. 311.

H. External Impoundment. Reasonable to secure a room ("freeze the scene") pending an authorized search to prevent the removal or destruction of evidence. *United States v. Hall*, 50 M.J. 247 (1999). But freezing the scene does not mean that investigators have unrestricted authorization to search crime scene without a proper warrant/authorization. *See Flippo v. West Virginia*, 120 S. Ct. 7 (1999) (holding that not general crime scene exception exists).

I. Seizure (Apprehension) of Persons.

1. Probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. RCM 302(c). *See also* Mil. R. Evid. 316(c).

2. Effects of unlawful apprehension. If there is no probable cause the apprehension is illegal and evidence obtained as a result of the apprehension is suppressed under Mil. R. Evid. 311. *See United States v. Dunaway*, 442 U.S. 200 (1979) (fruits of illegal apprehension are inadmissible).

3. Situations amounting to apprehension.

a. There is a seizure or apprehension of a person when a reasonable person, in view of all the circumstances, would not believe he or she was free to leave.

b. In "cramped" settings (*e.g*. on a bus, in a room), there is an apprehension when a reasonable person, in view of all the circumstances, would not feel "free to decline to answer questions." *Florida v. Bostick*, 501 U.S. 429 (1991).

c. Asking for identification is not an apprehension. *United States v. Mendenhall*, 446 U.S. 544 (1980).

d. Asking for identification and consent to search on a bus is not apprehension. *Florida v. Bostick*, 501 U.S. 429 (1991). There was no seizure under the fourth amendment when police got on bus during stopover at terminal and politely asked for consent to search passenger. No probable cause or reasonable suspicion was needed.

e. A police chase is not an apprehension.

(1) *Michigan v. Chestnut*, 486 U.S. 567 (1988). Following a running accused in patrol car was not a seizure where police did not turn on lights or otherwise tell accused to stop. Consequently, drugs accused dropped were not illegally seized.

(2) *California v. Hodari D*., 111 S. Ct. 1547 (1991). Police officer needs neither probable cause nor reasonable suspicion to chase a person who flees after seeing him. A suspect who fails to obey an order to stop is not seized within meaning of fourth amendment.

f. An order to report to military police.

(1) An order to report for non-custodial questioning is not apprehension.

(2) An order to report for fingerprints is not apprehension. *United States v. Fagan*, 28 M.J.64 (C.M.A. 1989). Accused, who was ordered to report to military police for fingerprinting was not apprehended. Fingerprinting is a much less serious intrusion than interrogation, and may comply with the fourth amendment even if there is less than probable cause.

(3) Transporting an accused to the military police station under guard is apprehension. *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982). When accused is ordered to go to military police station under guard, probable cause must exist or subsequent voluntary confession is inadmissible.

4. Apprehension at home or in quarters: a military magistrate, military judge, or the commander who controls that dwelling (usually the installation commander) must authorize apprehension in private dwelling. RCM 302(e); *Payton v. New York*, 445 U.S. 573 (1980).

a. A private dwelling includes:

(1) BOQ/BEQ rooms.

(2) Guest quarters.

(3) On-post quarters.

(4) Off-post apartment or house.

b. A private dwelling does not include:

(1) Tents.

(2) Barracks rooms. *See United States v. McCarthy*, 38 M.J. 398 (C.M.A. 1993). Warrantless apprehension in barracks room was proper.

(3) Vehicles.

c. Exigent circumstances may justify entering dwelling without warrant or authorization. *See* Mil. R. Evid. 315(g). *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). Accused was properly apprehended, without authorization, in transient billets. Exigent circumstances justified apprehension.

d. Consent may justify entering dwelling without proper warrant or authorization. *See* Mil. R. Evid. 316(d)(2). *United States v. Sager*, 30 M.J. 777 (A.C.M.R. 1990), *aff'd on other grounds*, 36 M.J. 137 (C.M.A. 1992). Accused, awakened by military police at on-post quarters, in his underwear, and escorted to police station was not illegally apprehended, despite lack of proper authorization, where his wife "consented" to police entry.

e. Probable cause may cure lack of proper authorization. *New York v. Harris*, 495 U.S. 14 (1990). Where police had probable cause but did not get a warrant before arresting accused at home, statement accused made at home was suppressed as violation of *Payton v. New York*, but statement made at police station was held to be admissible. The statement at the police station was not the "fruit" of the illegal arrest at home.

V. EXCEPTIONS TO AUTHORIZATION REQUIREMENT.

A. Exigent Circumstances.

1. General rule. A search warrant or authorization is not required when there is probable cause but insufficient time to obtain the authorization because the delay to obtain authorization would result in the removal, destruction, or concealment of evidence. Mil. R. Evid. 315(g).

2. Burning marijuana. *United States v. Lawless*, 13 M.J. 943 (A.F.C.M.R. 1982). Police smelled marijuana coming from house, looked into a window and spotted drug activity. Police then entered and apprehended everyone in the house, and later obtained authorization to search. Held: this was a valid exigency. *See also United States v. Dufour*, 43 M.J. 772 (N.M.Ct.Crim.App. 1995)(Observed use of drugs in home allowed search and seizure without obtaining warrant.)

3. Following a controlled buy.

   a. *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). Commander and police entered accused's barracks room and searched it immediately after a controlled buy. Held: search was valid based on exigent circumstances.

   b. *But see United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982). OSI agents and civilian police entered accused's off-post apartment immediately after a controlled buy. Search was improper because there were no real exigencies, and there was time to seek authorization.

4. Traffic Stops (Pretextual):

   a. *Whren v. United States*, 116 S.Ct. 1769 (1996). A stop of a motorist, supported by probable cause to believe he committed a traffic violation, is reasonable under the fourth amendment regardless of the actual motivations of the officers making the stop. Officers who lack probable cause to stop a suspect for a serious crime may use the traffic offense as a pretext for making a stop, during which they may pursue their more serious suspicions – using plain view or consent.

b. *United States v. Rodriquez*, 44 M.J. 766 (N.M. Ct. Crim. App. 1996). State Trooper had probable cause to believe that accused had violated Maryland traffic law by following too closely. Even though the violation was a pretext to investigate more serious charges, applying *Whren*, the stop was lawful.

c. Seizure of drivers and passengers. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The police may, as a matter of course, order the driver of a lawfully stopped car to exit. *Maryland v. Wilson*, 117 S.Ct. 882 (1997). *Mimms* rule extended to passengers. *But see Wilson v. Florida*, 734 So. 2d 1107, 1113 (Fla. Dist. Ct. App. 1999) applying *Mimms* and *Wilson* in holding that a police officer conducting a lawful traffic stop may not order a passenger back in the stopped vehicle.

5. Hot pursuit. *Warden v. Hayden*, 387 U.S. 294 (1967). Police, who chased armed robber into house, properly searched house.

6. Drugs or alcohol in the body.

a. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

b. *United States v. Porter*, 36 M.J. 812 (A.C.M.R. 1993). Warrantless blood alcohol test was not justified by exigent circumstances where there was no evidence that time was of the essence or that commander could not be contacted.

c. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

d. Nonconsensual extraction of body fluids without a warrant requires more than probable cause; there must be a "clear indication" that evidence of a crime will be found and that delay could lead to destruction of evidence. Mil. R. Evid. 312(d).

B. Automobile Exception.

1. General rule. Movable vehicles may be searched based on probable cause alone; no warrant is required. Mil. R. Evid. 315(g)(3).

a. *Chambers v. Maroney*, 399 U.S. 42 (1970). The word "automobile" is not a talisman, in whose presence the fourth amendment warrant requirement fades away. *See also Pennsylvania v. Labron*, 116 S.Ct. 2485 (1996). The auto exception is not concerned with whether police have time to obtain a warrant. It is concerned solely with whether the vehicle is "readily mobile."

b. Ability to Obtain a Warrant Irrelevant. *Maryland v. Dyson*, 199 S. Ct. 2013 (1999) (per curiam). Police in Maryland waited for 13 hours for suspect to return to state and did not attempt to obtain a warrant. Supreme Court reaffirmed that automobile exception does not require a "separate finding of exigency precluding the police from obtaining a warrant."

c. Rationale:

(1) Automobiles are mobile; evidence could disappear by the time a warrant is obtained.

(2) There is a lesser expectation of privacy in a car than in a home.

2. Scope of the search: any part of the car, including the trunk, and any containers in the car may be searched.

a. *United States v. Ross*, 456 U.S. 798 (1982). Police may search any part of the car and any containers in car if police have probable cause to believe they contain evidence of a crime.

b. *United States v. Evans*, 35 M.J. 306 (C.M.A. 1992). Military police who had probable cause to search auto for drugs properly searched accused's wallet found within auto.

3. Automobile is broadly defined. *California v. Carney*, 471 U.S. 386 (1985). Recreational vehicle falls within auto exception unless it is clearly used solely as a residence.

4. Timing of the search. *United States v. Johns*, 469 U.S. 478 (1985). Police had probable cause to seize truck but did not search it for three days. There is no requirement that search be contemporaneous with lawful seizure.

5. Closed containers in vehicles may also be searched. *California v. Acevedo*, 111 S. Ct. 1982 (1991). Probable cause to believe closed container located in vehicle contains evidence of crime allows warrantless search of container. This case overruled *United States v. Chadwick*, 433 U.S. 1 (1977), which required police to have warrant where probable cause relates solely to container within vehicle. *Accord United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991).

6. No distinction between containers owned by suspect and passengers: both sorts of containers may be searched. *Wyoming v. Houghton*, 119 S.Ct. 1297 (1999).

7. Applies to Seizure of Automobiles Themselves. *Florida v. White*, 199 S.Ct. 1555 (1999). Automobile exception applies to seizure of vehicle for purposes of forfeitures and police do not need to get a warrant if they have probable cause to believe that car is subject to seizure. If seized, police are then allowed to conduct a warrantless inventory of the seized vehicle.

VI. EXCEPTIONS TO PROBABLE CAUSE.

A. Consent Searches.

1. General rule. If a person voluntarily consents to a search of his person or property under his control, no probable cause or warrant is required. Mil. R. Evid. 314(e).

2. Persons Who Can Give Consent.

a. Anyone who exercises actual control over property may grant consent to search that property. Mil. R. Evid. 314(e)(2). *United States v. Reister*, 44 M.J. 409 (1996). House sitter had actual authority to consent to search apartment, books and nightstand. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988). Estranged husband gave consent to enter apartment and to search wife's closet.

b. Anyone with apparent authority may grant consent.

(1) *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Girlfriend with key let police into boyfriend's apartment where drugs were found in plain view. Police may enter private premises without a warrant if they are relying on the consent of a third party whom they reasonably, but mistakenly, believe has a common authority over the premises.

(2) *United States v. White*, 40 M.J. 257 (C.M.A. 1994). Airman who shared off-base apartment with accused had apparent authority to consent to search of accused's bedroom. The Airman told police that the apartment occupants frequently borrowed personal property from each other and went into each other's rooms without asking permission.

3. Voluntariness. Consent must be voluntary under the totality of the circumstances. Mil. R. Evid. 314(e)(4); *United States v. Frazier*, 34 M.J. 135 (C.M.A. 1992).

   a. Traffic stop. *Ohio v. Robinette*, 117 S.Ct. 417 (1996). A request to search a detained motorist's car following a lawful traffic stop does not require a bright line "you are free to go" warning for subsequent consent to be voluntary. Consent depends on the totality of the circumstances.

   b. Coerced consent is involuntary. *But see United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991). Accused's consent was voluntary despite fact that he allegedly took commander's request to be an implied order.

   c. It's OK to Trick. United States v. Vassar, 52 M.J. 9 (1999). Accused taken to hospital for head injury and told that a urinalysis was needed for treatment. CAAF held it is permissible to use trickery to obtain consent as long as it does not amount to coercion. Urinalysis admissible, despite military judge applying wrong standard for resolving questions of fact.

   d. Right to counsel. Reading Article 31 rights is recommended but not required. *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987). Request for consent after accused asked for lawyer was permissible. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). Commander's failure to give Article 31 warnings did not affect voluntariness of consent to urinalysis test.

4. Scope. Consent may be limited to certain places, property and times. Mil. R. Evid. 314(e)(3).

5. Withdrawal. Consent may be withdrawn at any time. Mil. R. Evid. 314(e)(3). *But see United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). Search was lawful where accused initially consented, then withdrew consent, and then consented again.

6. Burden of proof. Consent must be shown by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

7. Consent and closed containers. *Florida v. Jimeno*, 111 S. Ct. 1801 (1991). General consent to search allows police to open closed containers.

B. Searches Incident to Apprehension.

1. General rule. A person who has been apprehended may be searched for weapons or evidence within his "immediate control." Mil. R. Evid. 314(g).

a. Scope of search. A person's immediate control includes his person, clothing, and the area within his wingspan (sometimes expansively defined to include "lunging distance").

b. Purpose of search: to protect police from nearby weapons and prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969).

c. Substantial delay between apprehension and seizure will not invalidate the search "incident." *United States v. Curtis*, 44 M.J. 106 (1996) (citing *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234 (1974) (10 hours)).

2. Search of automobiles incident to arrest.

a. When a policeman has made a lawful arrest of an occupant of an automobile he may search the entire passenger compartment and any closed containers in passenger compartment, *but not the trunk*. Mil. R. Evid. 314(g)(2).

b. Search may be conducted after the occupant has been removed from the automobile, as long as the search is "contemporaneous" with the apprehension. Mil. R. Evid. 314(g)(2); *New York v. Belton*, 453 U.S. 545 (1981). Search of zipped jacket pocket in back seat of car following removal and arrest of occupants upheld; new bright line rule established.

c. Arrest means arrest. A search incident to a traffic citation, as opposed to an arrest, is not constitutional. *Knowles v. Iowa*, 119 S. Ct. 484 (1999).

C. Stop and Frisk.

1. General rule. Fourth amendment allows a limited government intrusion ("stop and frisk") based on less than probable cause ("reasonable suspicion") where important government interests outweigh the limited invasion of a suspect's privacy. *Terry v. Ohio*, 392 U.S. 1 (1968); Mil. R. Evid. 314(f).

2. Reasonable suspicion.

a. Reasonable suspicion is specific and articulable facts, together with rational inferences drawn from those facts, which reasonably suggest criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

(1) Reasonable suspicion is measured under the totality of the circumstances.

(2) Reasonable suspicion is less than probable cause.

b. Reasonable suspicion may be based on police officer's own observations. *United States v. Peterson*, 30 M.J. 946 (A.C.M.R. 1990). Reasonable suspicion existed to stop soldier seated with companion in car parked in dead end alley in area known for drug activity at night; car license plate was out-of-state.

c. Reasonable suspicion may be based on collective knowledge of all police involved in investigation. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Information in police department bulletin was sufficient reasonable suspicion to stop car driven by robbery suspect.

d. Reasonable suspicion may be based on an anonymous tip. *Alabama v. White*, 496 U.S. 325 (1990). Detailed anonymous tip was sufficient reasonable suspicion to stop automobile for investigative purposes. *But see Florida v. J.L.*, 120 S. Ct. 1375, 1379 (2000); anonymous tip needs to be reliable in "its assertion of illegality."

e. Reasonable suspicion may be based on drug courier "profile." *United States v. Sokolow*, 490 U.S. 1 (1988). "Innocent" noncriminal conduct amounted to reasonable suspicion to stop air traveler who paid $2100 cash for two tickets, had about $4000 in cash, was travelling to a source city (Miami), was taking 20 hour flight to stay only 2 days, was checking no luggage (only carry-ons), was wearing same black jumpsuit and gold jewelry on both flights, appeared nervous and was travelling under alias. Cocaine found in carry-on bag after dog alerted was admissible.

f. Reasonable suspicion may be based on "headlong flight" coupled with other circumstances (like nervous and evasive behavior and high-crime area). *Illinois v. Wardlow*, 120 S.Ct. 673 (2000).

3. Nature of detention. A stop is a brief, warrantless investigatory detention based on reasonable suspicion accompanied by a limited search.

a. Frisk for weapons.

(1) The police may frisk the suspect for weapons when he or she is reasonably believed to be armed and dangerous. Mil. R. Evid. 314(f)(2).

(2) Plain feel. Police may seize contraband items felt during frisk if its contraband nature of items is readily apparent. *Minnesota v. Dickerson*, 113 S.Ct. 2130 (1993) (seizure of cocaine during frisk held unconstitutional because the contraband nature of cocaine was not readily apparent). But looking down the front of a suspect's pants to determine if "bulges" were weapons was reasonable. *United States v. Jackson*, No. ACM 33178, 2000 CCA LEXIS 57 (A.F. Ct. Crim. App. Feb. 28, 2000) (unpublished opinion).

b. Length of the detention.

(1) 15 minutes in small room is too long. *Florida v. Royer*, 460 U.S. 491 (1983). Suspect was questioned in a large storage closet by two DEA agents was unreasonable; "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."

(2) 20 minutes may be sufficiently brief if police are hustling. *United States v. Sharpe*, 470 U.S. 675 (1985). 20-minute detention by highway patrolman waiting for DEA agent to arrive was not unreasonable.

c. Use of firearms.

(1) *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982). Pointing shotgun at murder suspect did not turn legitimate investigative stop into arrest requiring probable cause.

(2) *United States v. Sharpe*, 470 U.S. 695 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). Merely displaying handgun did not turn an investigative detention into a seizure requiring probable cause.

(3) *United States v. Alexander*, 901 F.2d 272 (2nd Cir. 1990). Approaching car with drawn guns and ordering driver out of car to frisk for possible weapons did not convert *Terry* stop into full-blown arrest requiring probable cause.

4. Important government interests.

a. Police officer safety. *Terry v. Ohio*, 392 U.S. 1 (1967). Frisk was justified when officer reasonably believed suspect was about to commit robbery and likely to have weapon.

b. Illegal immigrants. *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). But Border Patrol Agent's squeezing of a canvas bag during a routine stop of bus at checkpoint violated Fourth Amendment. *Bond v. United States*, 120 S. Ct. 1462 (2000).

c. Illegal drugs. *United States v. De Hernandez*, 473 U.S. 531 (1985). "[T]he veritable national crisis in law enforcement caused by smuggling of illicit narcotics. . . represents an important government interest." *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

d. Solving crimes and seeking justice. *United States v. Hensley*, 469 U.S. 221 (1985). There is an important government interest "in solving crime and bringing offenders to justice."

5. House frisk ("Protective Sweep"). *Maryland v. Buie*, 494 U.S. 325 (1990). Police may make protective sweep of home during lawful arrest if they have "reasonable belief based on specific and articulable facts" that a dangerous person may be hiding in area to be swept; evidence discovered during protective sweep is admissible.

D. Administrative Inspections.

1. The military's two-part test. Mil. R. Evid. 313(b).

a. Primary purpose test.

(1) Inspection. The primary purpose of an inspection must be to ensure the security, military fitness, or good order and discipline of the unit (administrative purpose).

(2) Criminal search. An examination made for the primary purpose of obtaining evidence for use in a court-martial or in other disciplinary proceedings (criminal purpose) is not an inspection.

b. Subterfuge rule. If a purpose of an examination is to locate weapons and contraband, and if the examination:

(1) Was directed immediately following the report of a crime and not previously scheduled; or

(2) Specific persons were selected or targeted for examination; or

(3) Persons were subjected to substantially different intrusions.

Then the prosecution must prove by clear and convincing evidence that the purpose of the examination was administrative, not a subterfuge for an illegal criminal search.

2. The Supreme Court's test. *New York v. Burger*, 482 U.S. 691 (1987) (warrantless "administrative" inspection of junkyard pursuant to state statute was proper).

   a. There are three requirements for a lawful administrative inspection:

      (1) There must be a substantial government interest in regulating the activity;

      (2) The regulation must be necessary to achieve this interest; and

      (3) The statute must provide an adequate substitute for a warrant.

         (a) The statute must give notice that inspections will be held;

         (b) The statute must set out who has authority to inspect;

         (c) The statute must limit the scope and discretion of the inspection.

   b. A dual purpose is permissible. A state can address a major social problem both by way of an administrative scheme and through penal sanctions.

3. Health and welfare inspections. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989). Stolen toolbox was discovered in short-timer's room. Government failed to show by clear and convincing evidence that examination was an "inspection" and not an "illegal search."

4. Unit urinalysis.

a. Invalid inspection. *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Accused's urinalysis inspection test results were improperly admitted where urinalysis "inspection" was conducted because the first sergeant heard rumors of drug use in his unit and prepared a list of suspects, including accused, to be tested. The military judge erred in ruling the government proved by clear and convincing evidence that the inspection was not a subterfuge for an illegal criminal search.

b. Valid inspection.

(1) Knowledge of "Reports." *United States v. Brown*, 52 M.J. 565 (Army Ct. Crim. App. 1999). Commander directed random urinalysis after report that several soldiers were using drugs in the command. The court found that the urinalysis was a valid inspection despite the recent report (proper administrative purpose for inspection).

(2) In *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), the accused's urinalysis results were properly admitted, despite the fact that the test followed report to commander's subordinate that accused had used drugs. Knowledge of a subordinate will not be imputed to the commander.

(3) Primary Purpose.

(a) *United States v. Shover*, 44 M.J. 119 (1996). The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." This was a proper administrative purpose.

(b) *United States v. Jackson*, 48 M.J. 292 (1998). Commander stated primary purpose of inspection of barracks rooms, less than 2 hours of receiving anonymous tip about drugs in a soldier's barracks room, was unit readiness. Court held inspection was proper. See also *United States v. Brown*, 52 M.J. 565 (Army Ct. Crim. App. 1999)

5. Gate inspections.

a. Procedures. *See* AR 210-10, Installations, Administration (12 Sep. 1977), para. 2-23c (summarizes the legal requirements for gate inspections) (the regulation has been rescinded but is being revised for future promulgation).

(1) A gate search should be authorized by written memorandum or regulation signed by the installation commander defining the purpose, scope and means (time, locations, methods) of the search.

(2) Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure, either by a sign or a visitor's pass.

(3) Technological aids. Metal detectors and drug dogs may be used. *See* AR 190-12, Military Police Working Dogs (15 Dec. 1984).

(4) Civilian employees. Check labor agreement for impact on overtime and late arrivals.

(5) Female patdowns. Use female inspectors if possible.

(6) Entry inspections.

(a) Civilians: must consent to inspection or their entry is denied; may not be inspected over their objection.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

(7) Exit inspections.

(a) Civilians: may be inspected over objection, using reasonable force, if necessary.

(b) Military: may be ordered to comply with an inspection and may be inspected over their objection, using reasonable force, if necessary.

b. Discretion of inspectors. *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987). Police may use some discretion, per written command guidance, to select which cars are stopped and searched.

E. Border Searches.

1. Customs inspections.

a. Customs inspections are constitutional border searches. *United States v. Ramsey*, 431 U.S. 606 (1977) (longstanding right of sovereign to protect itself).

b. Customs inspections in the military. Border searches for customs or immigration purposes may be conducted when authorized by Congress. Mil. R. Evid. 314(b); *United States v. Williamson*, 28 M.J. 511 (A.C.M.R. 1989). Military police customs inspector's warrantless search of household goods was reasonable since inspection was conducted pursuant to DOD Customs Regulations.

2. Gate searches overseas.

a. General rule. Installation commanders overseas may authorize searches of persons and property entering and exiting the installation to ensure security, military fitness, good order and discipline. Mil. R. Evid. 314(c).

(1) Primary purpose test is applicable.

(2) Subterfuge rule is inapplicable.

b. *United States v. Stringer*, 37 M.J. 310 (C.M.A. 1993). Gate searches overseas are border searches; they need not be based on written authorization and broad discretion can be given to officials conducting the search.

F. Inventories.

1. General rule. Inventories conducted for an administrative purpose are constitutional; contraband and evidence of a crime discovered during an inventory may be seized. Mil. R. Evid. 313(c).

a. Primary purpose test is applicable.

b. Subterfuge rule is inapplicable.

2. Purpose. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Inventories of incarcerated persons or impounded property are justified for three main reasons:

a. To protect the owner from loss;

b. To protect the government from false claims; and

c. To protect the police and public from dangerous contents.

3. Military inventories. Military inventories that are required by regulations serve lawful administrative purposes. Evidence obtained during an inventory is admissible. Inventories are required when soldiers are:

   a. Absent without leave (AWOL), AR 700-84, Issue and Sale of Personal Clothing (15 May 1983).

   b. Admitted to the hospital, AR 700-84, Issue and Sale of Personal Clothing (15 May 1983).

   c. Placed in pretrial or post-trial confinement, AR 190-47, The U.S. Army Corrections System (17 June 1994).

4. Discretion and Automobile Inventories. *Florida v. Wells*, 495 U.S. 1 (1990). When defendant was arrested for DWI and his car impounded and inventoried, the police improperly searched a locked suitcase in the trunk of car despite fact that there was no written inventory regulation. This search was insufficiently regulated to satisfy the fourth amendment.

5. *See* Anderson, *Inventory Searches*, 110 Mil. L. Rev. 95 (1985) (examples and analysis of military inventories).

G. Sobriety Checkpoints.

1. General rule. The fourth amendment does not forbid the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving; neither probable cause nor reasonable suspicion are required as the stop is constitutionally reasonable. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

2. Crime Prevention Roadblocks. *Indianapolis v. Edmond*, 121 S. Ct. __ (2000). Public checkpoints/roadblocks for the purpose of drug interdiction violate the Fourth Amendment. Stops for the purpose of general crime control are only justified when there is some quantum of individualized suspicion.

3. *See* Piepmeier, *Practical Problems of Sobriety Checkpoints*, ARMY LAW., Mar. 1992, at 15.

H. Emergency Searches.

1. General rule. In emergencies, a search may be conducted to render medical aid or prevent personal injury. Mil. R. Evid. 314(i).

2. *Michigan v. Taylor*, 436 U.S. 499 (1978). Entry into burning or recently burnt building is permissible.

3. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990). Warrantless entry into accused's apartment by landlord was permissible because apartment was producing egregious odor.

4. *United States v. Korda*, 36 M.J. 578 (A.F.C.M.R. 1992). Warrantless entry into accused's apartment was justified by emergency when supervisor thought accused had or was about to commit suicide.

I. Searches for Medical Purposes.

1. General rule. Evidence obtained from a search of an accused's body for a valid medical purpose may be seized. Mil. R. Evid. 312(f). *See United States v. Stevenson*, 53 M.J. 257 (2000) for applicability of medical purpose exception to members of the Temporary Disability Retired List.

2. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). Blood alcohol test of accused involved in fatal traffic accident was medically necessary, despite the fact that the test result did not actually affect accused's treatment. Test result was admissible.

J. School Searches. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Principal's search of student's purse, which revealed marihuana, was proper. School officials may conduct searches of students based upon "reasonable grounds" as long as the search is not "excessively intrusive."

VII. URINALYSIS.

A. Increase in Use? Army Statistics:

	Active			Guard/Reserve	
	1996	1998	1999	1996	1998
Opiates	421	854	1194	126/37	230/137
PCP	5	23	6	1/1	27/2
Amph	157	689	546	143/32	310/80
Cocaine	1262	1341	1304	983/306	774/369
THC	4111	5121	5393	3008/820	2542/989
LSD	13	17	96	1/0	0/0

B. References.

1. DOD Dir. 1010.1, Drug Abuse Testing Program (28 Dec. 1984).

2. DOD Inst. 1010.16, (9 Dec. 1994)(Red Tape Seal).

3. AR 600-85, Alcohol and Drug Abuse Prevention and Control Program (21 Oct. 1988) (I03, 1 Oct. 1993).

4. Army Center for Substance Abuse Programs, Biochemical Testing Branch, Alexandria, VA. Telephone: (703) 681-9453.

C. SCIENTIFIC ASPECTS OF URINALYSIS PROGRAM.

1. What Urinalysis Test Proves.

a. Urine test proves only past use; it proves that drug or drug metabolites (waste products) are in the urine.

b. Urine test does not prove:

(1) Impairment.

(2) Single or multiple usage.

(3) Method of ingestion.

(4) Knowing ingestion.

(a) In the past, presence of an amount of drug metabolite allowed a permissible inference that the accused knowingly consumed a particular drug. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

(b) Based on *United States v. Campbell,* 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), the government's burden is now heavier to raise the permissible inference (three-prong test).

(c) The CAAF has yet to decide any cases where *Campbell* has been applied. *See United States v. Barnes*, 53 M.J. 624 (N.M. Ct. Crim. App. 2000); *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

(d) "Other" evidence under *Campbell*. In *Campbell II*, the court stated that "[i]f the rest results, standing alone, do not provide a rational basis for inferring knowing use, then the prosecution must produce other direct or circumstantial evidence of knowing use in order to meet its burden of proof. *See United States v. Tanner*, 53 M.J. 778 (A.F. Ct. Crim. App. 2000) and *United States v. Phillips*, 53 M.J. 758 (A.F. Ct. Crim. App. 2000). But compare both with United States v. Barnes, 53 M.J. 624 (N.M. Ct. Crim. App. 2000).

2. Drugs Tested.

a. Marihuana (THC metabolite)

b. Cocaine (BZE metabolite)

c. Other drugs tested (each sample, on rotating basis, or at direction of command):

(1) LSD

(2) Opiates (morphine, codeine, 6-MAM metabolite of heroin)

(3) PCP

(4) Amphetamines

(5) Barbiturates

(6) Anabolic steroids

3. Drug Metabolites.

a. Marihuana.

(1) Main psychoactive ingredient is delta 9-tetrahydro-cannabinol (short name: delta-9 THC).

(2) Main metabolite (waste product) of delta-9 THC is delta 9-tetrahydrocannabinol-9-carboxylic acid (short name: 9-carboxyl THC). This is metabolite tested for within DOD.

(3) 9-carboxyl THC is not psychoactive, and is not the only metabolite. Percentage of total metabolites that are 9-carboxyl THC is from 10-90%.

(4) 9-carboxyl THC is found in urine only when human body metabolizes marihuana; it cannot be naturally produced by human body.

b. Cocaine.

(1) Main metabolite is benzoylecgonine (BZE).

(a) This is the metabolite tested for within DOD.

(b) BZE is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body, but can be produced by introducing cocaine directly into urine (no metabolizing needed).

(2) Another metabolite is ecgonine methyl ester (EME).

(a) This metabolite is not tested for within DOD.

(b) EME dissipates from the body more quickly than BZE.

(c) EME is found in urine when human body metabolizes cocaine; it cannot be naturally produced by human body and cannot be produced by introducing cocaine directly into urine.

4. Army Testing Procedures. *See* AR 600-85, Appendix E.

a. Unit Alcohol and Drug Coordinator (UADC).

(1) Prepares urine sample bottle by placing soldier's social security number, specimen number and julian date on bottle.

(2) Prepares DD Form 2624 (new chain of custody form) listing up to 12 samples on form.

(3) Prepares urinalysis ledger listing all samples.

(4) Gives soldier bottle in presence of observer. Soldier initials bottle and signs ledger.

b. Observer.

(1) Signs ledger.

(2) Directly observes soldier provide sample and place cap on bottle.

(3) Returns bottle to UADC, signs chain of custody form and initials bottle label.

c. UADC.

(1) Affixes red tape seal.

(2) Signs chain of custody form and initials all bottle labels.

(3) Places bottles in box with chain of custody form.

d. Installation Biochemical Test Coordinator (IBTC).

(1) Receives samples from UADC within 24 hours of urinalysis. Ensures samples and forms are in proper order and signs chain of custody form.

(2) May conduct prescreening test on samples.

(3) Ensures bottles are sealed and mails them to laboratory for testing.

5. Testing Facilities Used by Army.

a. Army Forensic Toxicology Drug Testing Laboratory, Tripler Medical Center, Honolulu, HI. Telephone: (808) 433-5176. AC/RC.

b. Army Forensic Toxicology Drug Testing Laboratory, Fort Meade, MD. Telephone: (301) 677-7085. AC/RC

6. Urinalysis Tests Used.

a. Initial screening test used at installation: E.M.I.T. (Syva Co.) or "Enzyme Multiplied Immunoassay Technique" portable tester.

b. Laboratory tests:

(1) Screening test: immunoassay (KIMS Technology).

(a) Used at Army & Air Force laboratories and Northwest Toxicology civilian laboratory.

(b) Test attaches chemical markers to metabolites and measures transmission of light through sample (more light, more positive). Every positive screened twice.

(c) Test is not 100% accurate.

(2) Confirming test: gas chromatography/mass spectroscopy (GC/MS).

(a) Used at Army & Air Force laboratories and Northwest Toxicology civilian laboratory.

(b) GC test measures period of time molecules in sample take to traverse a tube; drug metabolites traverse tube in characteristic period of time.

(c) MS test fragments molecules in sample and records the fragments on spectrum. Metabolite fragments are unique.

(d) Test is 100% accurate.

7. Cut-off Levels. DOD and urine testing laboratories have established "cut-off" levels. Samples which give test results below these cut-off levels are reported as negative. A sample is reported as positive only if it gives test results above the cut-off level during both the screening and the confirming test.

a. Cut-off levels for screening tests (EMIT and IA).

Drug	*ng/ml*
Marihuana (THC)	50
Cocaine (BZE)	150
Amphetamines	500
Barbiturates	200

Opiates	2000
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.5

b. Cut-off levels for GC/MS test:

Drug	*ng/ml*
Marihuana (THC)	15
Cocaine (BZE)	100
Amphetamine/methamphetamine	500
Barbiturates	200
Opiates	
Morphine	4000
Codeine	2000
6-MAM (heroin)	10
Phencyclidine (PCP)	25
Lysergic Acid Diethylamide (LSD)	0.2

8. Drug Detection Times.

a. Time periods which drugs and drug metabolites remain in the body at levels sufficient to detect are listed below. Source: US Army Drug Oversight Agency & Technical Consultation Center, Syva Company, San Jose, California, telephone: 1-800-227-8994 (Syva).

Drug:	Retention time (approx.):
Marihuana (THC)(Half-life 36 hrs)	
Acute dosage (1-2 joints)	2-3 days
Marihuana (eaten)	1-5 days
Moderate smoker (4 times per week):	5 days
Heavy smoker (daily):	10 days
Chronic smoker:	14-18 days
(may be longer)	20 days or

Cocaine (BZE)(Half-life 4 hrs)	2-4 days
Amphetamines	1-2 days
Barbiturates	
Short acting (e.g. secobarbital):	1 day
Long acting (e.g. phenobarbital):	2-3 weeks
Opiates	2 days
Phencyclidine (PCP):	14 days
Chronic user:	up to 30 days
Lysergic Acid Diethylamide(LSD)	8-30 hours

b. Factors which affect retention times:

(1) Drug metabolism and half-life.

(2) Donor's physical condition.

(3) Donor's fluid intake prior to test.

(4) Donor's method and frequency of ingestion of drug.

c. Detection times may affect:

(1) Probable cause. Information concerning past drug use may not provide probable cause to believe the soldier's urine contains traces of drug metabolites, unless the alleged drug use was recent.

(2) Jurisdiction over reservists. To prosecute reservist for drug use, government must prove use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993). Court, in dicta, questioned validity of *Chodara* and stated that the body continues to use drugs as long as they remain in the body.

D. COMMANDERS' OPTIONS.

1. Courts-Martial.

a. Court-martial procedures are complex; the Mil. R. Evid. apply.

b. Reservists. Reservists may not be convicted at a court-martial for drug use unless use occurred while on federal duty. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (urine sample testing positive for cocaine less that 36 hours after reservist entered active duty was insufficient to establish jurisdiction). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (court, in dicta, questioned the validity of *Chodara* and stated that body continues to "use" drugs as long as they remain in the body).

2. Nonjudicial Punishment.

a. Nonjudicial punishment procedures are relatively simple. *See* AR 27-10, Military Justice (24 June 1996), ch. 3.

b. Mil. R. Evid. do not apply. AR 27-10, para. 3-18j.

c. Burden of proof is beyond reasonable doubt. AR 27-10, para. 3-18l.

d. Reservists. Reservists may not receive nonjudicial punishment under Article 15 for drug use unless use occurred while on federal duty. *See* Article 2(d)(2) (reserve component personnel may be involuntarily recalled to active duty for nonjudicial punishment only with respect to offenses committed while on federal duty) and *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990).

3. Administrative Separations.

a. The following soldiers must be processed for administrative separation IAW AR 600-85, para. 1-11b (I03, 1 Oct. 1993):

(1) Soldiers who abuse drugs one time and are:

(a) Officers and noncommissioned officers (SGT and above);

(b) Other enlisted soldiers with three or more years of service (active or reserve).

(2) Any soldier who abuses drugs two or more times.

b. Rules at administrative separations are simpler. *See* AR 15-6, Procedure for Investigating Officers and Boards of Officers, (11 May 1988).

(1) The Mil. R. Evid. do not apply. AR 15-6, para. 3-6a.

(2) Burden of proof is preponderance of evidence. AR 15-6, para. 3-9b.

c. Reservists. Reservists may be separated for drugs even though use did not occur while on federal duty. *See* AR 135-178, Separation of Enlisted Personnel (1 Sep. 1994) and AR 135-175, Separation of Officer Personnel (1 May 1971).

E. CONSTITUTIONALITY OF URINALYSIS PROGRAM.

1. Probable Cause Urinalysis.

a. A urinalysis test is constitutional if based upon probable cause. Mil. R. Evid. 312(d) and 315.

b. A warrant or proper authorization may be required.

c. *Schmerber v. California*, 384 U.S. 757 (1966). Warrantless blood alcohol test was justified by exigent circumstances.

d. *United States v. Pond*, 36 M.J. 1050 (A.F.C.M.R. 1993). Warrantless seizure of urine to determine methamphetamine use was not justified by exigent circumstances because methamphetamine does not dissipate quickly from the body.

2. Inspections.

a. A urinalysis is constitutional if it is part of a valid random inspection.

Mil. R. Evid. 313(b); *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994). The fact that the results of urinalysis inspections are made available to prosecutors did not make the inspection an unreasonable intrusion. *See also Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989) (urine tests of train operators involved in accidents are reasonable searches) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (urine testing of employees who apply to carry firearms or be involved in drug interdiction does not require a warrant). *Chandler v. Miller*, 117 S.Ct. 1295 (1997) (to conduct urinalysis without probable cause, must show "special need.")

b. Authority to order urinalysis inspections. *United States v. Evans*, 37 M.J. 867 (A.F.C.M.R. 1993). Commander of active duty squadron to which accused's reserve unit was assigned had authority to order urinalysis inspection.

c. Subterfuge under Mil.R.Evid. 313(b).

(1) Report of Offense. *United States v. Shover*, 44 M.J. 119 (1996). Marihuana was "planted" in an officer's briefcase. Following "report" of an offense and during investigation to find the "planter," the commander ordered a urinalysis. The accused tested positive for methamphetamines. Although the test triggered the subterfuge rule of Mil. R. Evid. 313(b), the government met its clear and convincing burden. The primary purpose for the inspection was to end "finger pointing, hard feelings," and "tension." The commander "wanted to get people either cleared or not cleared." The judge ruled the primary purpose was to "resolve the questions raised by the incident, not to prosecute someone." CAAF affirmed.

(2) Knowledge of subordinates.

(a) *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994). Urinalysis test results were properly admitted, even though the urinalysis inspection followed reports that accused had used drugs and even though accused's section was volunteered for inspection on basis of reports. Commander who ordered inspection was ignorant of reports.

(b) *United States v. Campbell*, 41 M.J. 177 (C.M.A. 1994). Urinalysis test results were improperly admitted where urinalysis inspection was conducted because first sergeant heard rumors of drug use in unit and selected accused to be tested based on his suspicions. Judge erred in finding that government proved, by clear and convincing evidence, that inspection was not subterfuge for criminal search.

d. Primary Purpose. *United States v. Brown*, 52 M.J. 565 (A.C.C.A. 1999). Several members of unit allegedly were using drugs. Because of this, CDR ordered random 30% inspection. CDR's primary purpose was because he "wanted to do a large enough sampling to validate or not validate that there were drugs being used in his company, and he additionally was very concerned about the welfare, morale, and safety of the unit caused by drugs." Met the primary purpose test of M.R.E. 313(b).

e. Targeting soldiers for inspection. *United States v. Moore*, 41 M.J. 812 (N.M. Ct. Crim. App. 1995). Military judge improperly excluded urinalysis results where accused was placed in nondeployable "legal" platoon after an Article 15, and regimental commander inspected accused's platoon more frequently than others. Commander did not target. More frequent tests were based on disciplinary problems.

3. Consent Urinalysis.

a. A urinalysis is constitutional if obtained with consent. Mil. R. Evid 314(e).

b. Consent must be voluntary under totality of the circumstances. *United States v. White*, 27 M.J. 264 (C.M.A. 1988).

c. Consent is involuntary if commander announces his intent to order the urine test should the accused refuse to consent. Mil. R. Evid. 314(e)(4).

d. Consent is voluntary if the commander does not indicate his "ace in the hole" (authority to order a urinalysis). *United States v. White*, 27 M.J. 264 (C.M.A. 1988). *See also United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989). Consent was voluntary where accused never asked what options were and commander never intimated that he could order him to give a sample. *See also United States v. Vassar*, 52 M.J. 9 (1999). Permissible to use trickery to obtain consent as long as consent was not coerced.

e. If soldier asks "what if I do not consent?"

(1) *United States v. Radvansky*, 45 M.J. 226 (1996). Totality of the circumstances, not a bright-line rule, controls consent to urinalysis in the face of a command request. Notwithstanding First Sergeant's comment that accused could "give a sample of his own free will or we could have the commander direct you to do so" accused volutntarily consented to urinalysis. The mere remark that a commander can authorize a search does not render all subsequent consent involuntary.

(2) *But see United States v. White*, 27 M.J. 264 (C.M.A. 1988). Consent is involuntary if commander replies that he or she will order urine test.

(3) Consent is voluntary if commander meaningfully explains the consequences of a consent sample versus a fitness for duty or probable cause sample. *United States v. White*, 264 M.J. 264, 266 (C.M.A. 1988) (dicta). See also *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990).

f. Probable cause generally will not cure invalid consent. *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990). Urinalysis was inadmissible where consent was obtained involuntarily even though commander had probable cause to order urinalysis. Court stated, however, that probable cause to order urine test may provide an alternative basis upon which to admit urine sample obtained through invalid consent where:

(1) Commander deals directly with accused in requesting consent, and would have authorized seizure of urine based on probable cause but for belief that he or she had valid consent; or

(2) Commander actually orders urinalysis based on probable cause, but relaying official asks for consent (which later is found to be invalid).

(3) Requesting consent is not interrogation under Art. 31 or the fifth amendment. *United States v. Schroeder*, 39 M.J. 471 (C.M.A. 1994). Civilian police officer apprehended accused for suspected use of drugs and later asked if he would consent to a urinalysis. This question was not custodial interrogation under the fifth amendment.

(4) Attenuation of taint from prior unwarned admissions. *United States v. Murphy*, 39 M.J. 486 (C.M.A. 1994). Accused's consent to urinalysis test was not tainted by prior admissions obtained prior to rights warnings. Prior questioning was not coercive and consent was given voluntarily.

(5) *Consent. It's OK to Trick. United States v. Vassar*, 52 M.J. 9 (1999). NCO told accused he needed to consent to urinalysis because of a head injury. Permissible to use trickery to obtain consent as long as it does not amount to coercion

4. Medical Urinalysis. A urinalysis is constitutional if conducted for a valid medical purpose. Mil. R. Evid. 312(f).

a. *United States v. Fitten*, 42 M.J. 179 (1995). Forced catheterization of accused did not violate fourth amendment or Mil. R. Evid. 312(f) where it was medically necessary to test for dangerous drugs because of accused's unruly and abnormal behavior. Diversion of part of urine obtained from medical test to drug laboratory to build case against accused was permissible.

b. In the Army, most medical tests may only be used for limited purposes. AR 600-85, paras. 6-4a and 10-3b(1).

5. Fitness For Duty Urinalysis.

a. A commander may order a urinalysis based upon reasonable suspicion to ensure a soldier's fitness for duty even if the urinalysis is not a valid inspection and no probable cause exists. Results of such tests may only be used for limited purposes. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991). *See* AR 600-85, para. 10-3(a); AFR 30-2, para. 5-8.

b. Reasonable suspicion required for a fitness for duty urinalysis is the same as reasonable suspicion required for a "stop and frisk" under the fourth amendment. *United States v. Bair*, 32 M.J. 404 (C.M.A. 1991).

6. Use in Rebuttal.

a. *United States v. Graham,* 50 M.J. 56 (1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result 4 years earlier, of which accused was acquitted in court-martial, after accused stated he was "flabbergasted" at having tested positive.

b. *United States v. Matthews*, 53 M.J. 465 (2000). CAAF set aside the findings and sentence (reversing the AFCCA decision). The main issue in the case concerned the trial judge's decision to allow the government to admit evidence of appellant's use of marijuana that occurred after the date of the charged offense. The appellant was found guilty of a single specification of wrongful use of marijuana (between 1 and 29 April 1996). She testified that she did not use marijuana and that she did not know why she tested positive. The government then asked to use a subsequent command-directed urinalysis (conducted on 21 May 1996) for impeachment. The trial judge admitted the evidence for impeachment and ruled it was also admissible under Mil. R. Evid. 404(b) to show her prior use was knowing and conscious. CAAF disagreed, finding that extrinsic evidence my not be used to rebut good military character (CAAF noted that the trial judge did not consider Mil. R. Evid. 405(a) and he rejected Mil. R. Evid. 608).

7. Results of Violation of Constitution.

a. Administrative Separations. Evidence obtained in violation of the Constitution is admissible, unless it was obtained in bad faith (*i.e.* the officials conducting the urinalysis knew it was unlawful). A urinalysis conducted in bad faith is admissible only if the evidence would inevitably have been discovered. AR 15-6, para. 3-6c(7).

b. Nonjudicial Punishment under Article 15. Evidence obtained in violation of the Constitution is admissible. AR 27-10, para. 3-18j. However, soldier may demand trial by court-martial. AR 27-10, para. 3-18d.

c. Court-martial. Evidence obtained in violation of the Constitution is inadmissible. *See* Mil. R. Evid. 311.

F. LIMITED USE POLICY.

1. Limited Use.

a. Under the limited use policy, the results of the following tests may not be used as a basis for an Article 15 or court-martial or to determine the "character of service" in an administrative separation action. AR 600-85, para. 6-4; AFR 30-2, para. 5-8b.

(1) Fitness for Duty Tests. AR 600-85, para. 6-4a(1).

(2) Medical Tests. The limited use policy applies to tests:

(a) Directed by physician who suspects drug use and orders test to ascertain need for counseling, treatment, or rehabilitation. AR 600-85, paras. 6-4a(1) and 10-3b(1).

(b) Taken in conjunction with soldier's participation in Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). AR 600-85, para. 6-4a(1).

(c) Obtained as a result of soldier's emergency medical care for an actual or possible drug overdose, unless such treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 6-4a(5).

b. If drug use discovered during a limited use test is introduced during an administrative separation, the soldier must receive an honorable discharge.

c. The limited use policy does not preclude use of limited use tests in rebuttal or initiation of disciplinary action based on independently derived evidence. AR 600-85, para. 6-4e.

d. A fitness for duty urinalysis or medical test may serve as the basis for administrative action, to include requesting a second urinalysis. *United States v. Williams*, 35 M.J. 323 (C.M.A. 1992). Exclusionary rule did not preclude admission of accused's incriminating statements or consensual second urinalysis even though questioning and request for urinalysis were based upon prior positive fitness for duty urinalysis. Taint from fitness for duty urinalysis was sufficiently attenuated.

2. Full Use. The limited use policy does not apply to the types of tests listed below. These tests may be used at courts-martial, Article 15 proceedings, and administrative separations:

a. Probable cause tests.

b. Inspections.

c. Consent tests. *United States v. Avery*, 40 M.J. 325 (C.M.A. 1994). Accused was not entitled to protection of Air Force limited use policy, AFR 30-2, which precludes the use of certain evidence derived from a service member's voluntary self-identification as a drug abuser. The accused voluntarily consented to a urinalysis after his wife revealed his drug use to his chain of command. The accused never admitted using drugs.

d. Medical tests which are **not** covered by the limited use policy described above.

(1) Obtained as a result of soldier's emergency medical care for an actual or possible drug overdose, where the treatment resulted from apprehension by military or civilian law enforcement officials. AR 600-85, para. 6-4a(5).

(2) Routine tests directed by a physician which are not the result of suspicion of drug use and not taken in conjunction with ADAPCP. AR 600-85, paras. 6-4a(1) and 10-3b(1).

3. Command Directed Tests. Be wary of the term "command directed" urinalysis. The ability or inability to use the test results for UCMJ or separation purposes depends on the type of test, not on whether or not it is labeled command directed. *United States v. Streetman*, 43 M.J. 752 (A.F. Ct. Crim. App. 1995) Accused was convicted of marihuana use. The court held that letter reissuing original inspection order but labeled as "Commander Directed" (Air Force equivalent to fitness for duty) and ordering accused to submit to drug testing did not transform prior legitimate random urinalysis inspection into fitness for duty so as to preclude admission of drug test results.

G. PROSECUTING URINALYSIS CASES.

1. Procedures for Taking Test.

a. Observation During Testing. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) Direct observation of officer providing sample by enlisted person did not make collection of urine unreasonable.

b. Refusal to Provide Sample. *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991). Accused's submission of toilet water as urine sample did not constitute obstruction of justice but could have been charged as disobedience of order.

2. Inspection of AWOL (UA) Personnel.

a. Soldiers who are absent without leave may be subjected to compulsory urinalysis testing pursuant to command policy to inspect the urine of such soldiers. *Cf. United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) (compelling soldiers who previously tested positive for drug use to submit to second urinalysis is proper inspection).

b. Such an inspection must be conducted in accordance with command policy.

(1) *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990). Accused, who was late for duty, was not unauthorized absentee within meaning of policy requiring unauthorized absentees to submit to urinalysis; test of accused's urine was not proper inspection.

(2) *United States v. Patterson*, 39 M.J. 678 (N.M.C.M.R. 1993). Testing of soldier returning from unauthorized absence was not a proper inspection because it was not conducted in accordance with instruction requiring such inspections. Commander who ordered test did so based on the "seriousness" of the absence, rather than on a random basis.

3. Retesting Soldiers. Requiring retesting, during next random urinalysis, of all soldiers who tested positive during previous urinalysis is a proper inspection. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). Commander's policy letter which required retesting of soldiers who were positive on previous urinalysis was proper. *See* Appendix A for sample policy letter from U.S. Army Trial Counsel Assistance Program.

4. Retesting Samples. Selection of negative samples for additional testing is improper unless done on a random basis. *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990). Installation alcohol and drug control officer's decision to select urine sample which had pre-tested negative for further testing at drug laboratory based on belief that sample might test positive constituted unreasonable inspection.

5. Deviations in Procedures.

   a. Deviations from regulations generally do not affect admissibility of test results. *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989); *United States v. Timoney*, 34 M.J. 1108 (A.C.M.R. 1992).

   b. Gross deviations from urinalysis regulation may allow exclusion of positive test results. *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990).

   c. Accused randomly selected by computer for urinalysis testing IAW AF Instruction 44-120. Method was proper even if there were minor administrative deviations. *United States v. Beckett*, 49 M.J. 354 (1998).

6. Proving Knowing Ingestion of Drugs.

   a. To be guilty of wrongful use of drugs the accused must know that (1) he or she consumed the relevant substance and (2) the substance was contraband. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

   b. Presence of drug metabolite in urine permits permissible inference that accused knowingly used drug, and that use was wrongful. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988); *United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990).

7. Permissive inference of wrongfulness may be sufficient to support conviction despite defense evidence that ingestion was innocent.

a. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Permissive inference overcame accused's suggestion that wife may have planted marihuana in his food without his knowledge.

b. *United States v. Williams*, 37 M.J. 972 (A.C.M.R. 1993) (dicta) When defense reasonably raises the defense of innocent ingestion, this trumps the presumption of wrongfulness and the accused must be found not guilty as a matter of law unless the government introduces additional evidence to establish the wrongfulness of the use.

c. *See also United States v. Campbell,* 50 M.J. 154 (1999). Evidence was insufficient to permit inference of wrongfulness of use from concentration of lysergic acid diethylamide (LSD) reported in serviceman's urine sample through use of gas chromatography tandem mass spectrometry (GC/MS/MS); prosecution evidence did not prove that cutoff level of 200 picograms per milliliter (pg/ml) established by Department of Defense (DoD), and concentration level of 307 pg/ml reported by laboratory which conducted the test would, in view of margin of error, reasonably exclude possibility of false positive and would indicate reasonable likelihood that at some point a person would have experienced physical and psychological effects of the drug. The decision was reconsidered but not changed. *United States v. Campbell*, 52 M.J. 386 (2000) (supplementing the earlier decision). For a discussion of the impact of *Campbell*, see Major Walter M. Hudson, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38; *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

8. Use of Expert Testimony.

a. Expert testimony required at court-martial. Expert testimony is generally required to prove wrongful use of drugs; result of test alone (paper case) is inadequate. *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987).

b. Expert testimony must establish not only that drug or metabolite was in accused's body but that drug or metabolite is not naturally produced by the body or any other substance but drug in question. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

c. Judicial notice is generally an inadequate substitute for expert testimony. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991*). But see United States v. Phillips*, 53 M.J. 758, 765 (A.F. Ct. Crim. App. 2000) (In Judge Young's concurring opinion, he believes that, in most drug cases, scientific evidence admitted is equivalent to adjudicative facts and, therefore, subject to judicial notice).

d. Stipulations may be an adequate substitute for expert testimony.

(1) *United States v. Ballew*, 38 M.J. 560 (A.F.C.M.R. 1993). A stipulation of expected testimony that expert would testify that accused ingested cocaine was not a confessional stipulation. No providency inquiry was required before the stipulation could be received.

(2) *United States v. Hill*, 39 M.J. 712 (N.M.C.M.R. 1993). Evidence was insufficient to support conviction of use of marihuana where stipulations of fact, documentary evidence and testimony failed to link positive urine sample to accused.

e. More on experts. *See* Major Walter M. Hudson & Major Patricia A. Ham, *United States v. Campbell: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38 and Lieutenant Commander David A. Berger & Captain John E. Deaton, *Campbell and its Progeny: The Death of the Urinalysis Case*, 48 NAV. L. REV. 1 (2000).

f. Burden for expert testimony. Expert evidence other than that used to meet the three-prong standard needs to meet evidentiary requirements of reliability and relevance. *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), *citing Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993); *Kumho Tire C., Ltd. V. Carmichael*, 526 U.S. 137, 153-55 (1999).

g. Experts at counsel table. *United States v. Gordon*, 27 M.J. 331 (C.M.A. 1989). Government urinalysis expert may remain in courtroom while another government expert testifies about lab testing procedures.

h. "Non-expert" expert. *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992). Allowing undercover agent to testify that he had never tested positive for drugs although he was often exposed to them was permissible to rebut accused's defense of passive inhalation.

i. Use & Choice of Experts. *United States v. Short*, 50 M.J. 370 (1999). Defense counsel asked for an expert who was not employed by the DOD drug lab to assess chain of custody and procedures and to assist with scientific evidence. Also raised a passive inhalation defense. Defense failed to show that the case was not "the usual case." Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case." Available government expert from lab was sufficient to provide expert testimony on passive inhalation/innocent ingestion.

9. Negative Urinalysis Results. A urine sample containing drug metabolites in concentrations below the regulatory cut-off level for positive results will be declared negative, even though the sample may indicate drug use.

   a. Negative test results are usually inadmissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marihuana three days after last charged use of marihuana. Admission of results of RIA test would have been too confusing. The C.M.A. stated that the Mil. R. Evid. should be used to determine if negative test results are admissible and overruled *United States v. Arguelo* 29 M.J. 198 (C.M.A. 1989) (which prevented government from using negative test results because such use was contrary to regulation).

   b. Use of negative test results is permitted in the Coast Guard. *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994) *rev'd on other grounds*, 115 S.Ct. 2031 (1995). Government's introduction of "negative" test results, which showed presence of marihuana, but at amount below cut-off, was not plain error. Results were used to corroborate testimony of witnesses who saw accused smoke marihuana and Coast Guard Regulation did not prohibit use of such test results.

10. Using Positive Test Results as Rebuttal Evidence.

   a. *United States v. Graham,* 50 M.J. 56 (1999). Military Judge erred in allowing single rebuttal question by trial counsel about a prior positive marijuana result 4 years earlier (acquittal) in court-martial, after accused stated he was "flabbergasted" at having tested positive. CAAF held that positive marijuana result was not logically relevant: statistical probability is unknown as to whether accused might test positive twice within 4 years and there is no necessary logical connection between testing positive twice and being flabbergasted.

b. *U.S. v. Matthews*, 53 M.J. 465 (2000). CAAF holds that extrinsic evidence my not be used to rebut good military character (CAAF noted that the trial judge did not consider Mil. R. Evid. 405(a) and he rejected Mil. R. Evid. 608).

11. See generally Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sep. 1988, at 7, and Masterton and Sturdivant, *Urinalysis Administrative Separation Boards in Reserve Components*, ARMY LAW., Apr. 1995, at 3.

H. DEFENDING URINALYSIS CASES.

1. Defenses.

a. Passive inhalation. For this defense to be successful, a soldier generally must have been exposed to concentrated drug smoke in a small area for a significant period of time. *See* Anderson, *Judicial Notice in Urinalysis Cases,* ARMY LAW. Sep. 1988, at 19.

b. Innocent ingestion.

(1) *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). Accused suggested wife planted marihuana in his food without his knowledge.

(2) *United States v. Prince*, 24 M.J. 643 (A.F.C.M.R.1987). Accused's wife allegedly put cocaine in his drink without his knowledge to improve his sexual performance.

(3) *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). Accused's roommate testified that she put cocaine in beer which accused unwittingly drank. Government improperly cross examined roommate on prior arrest for conspiracy and attempted burglary, but error was harmless.

c. Innocent inhalation.

(1) *United States v. Perry*, 37 M.J. 363 (C.M.A. 1993). Accused's explanation that he unwittingly smoked a filtered cigarette laced with cocaine 28 hours before test was not credible, given expert's testimony that (1) accused would have to ingest an almost toxic dose of cocaine to achieve the 98,000 ng/ml test result his sample yielded, and (2) cocaine mixed with a cigarette would not work since cocaine will not vaporize or pass through a filter. Erroneous admission of evidence that accused acted as informant was harmless.

(2) *United States v. Gilbert*, 40 M.J. 652 (N.M.C.M.R. 1994). Accused allegedly borrowed cigarettes from a civilian which, unknown to the accused, contained marihuana. At trial, the civilian refused to answer questions about what the cigarettes contained. Defense counsel was ineffective for not seeking to immunize the civilian.

d. Innocent absorption through contact with drugs on currency: unlikely to be a successful defense. *See* Elsohly, *Urinalysis and Casual Handling of Marihuana and Cocaine*, 15 J. Analytical Toxicology 46 (1991).

e. Use of Hemp related products. Hemp products come from the same plant as marihuana: see Note, *The Hemp Product Defense* and *Tips in Hemp Product Cases,* December 1998 Army Lawyer.

f. Switched Samples ("chain of custody" broken).

(1) *United States v. Gonzales*, 37 M.J. 456 (C.M.A. 1993). Where observer had no recollection of how urine was transferred from one container to another, but testified that urine was never out of her sight, military judge properly overruled chain of custody objection.

(2) *United States v. Montijo*, No. 30385 (A.F.C.M.R. 28 Jun. 1994). Government was not required to establish chain of custody for sample bottle from the time of its manufacture until its use.

g. Laboratory Error.

(1) *Unites States v. Manuel*, 43 M.J. 282 (1995). Urinalysis test results were improperly admitted where laboratory failed to retain accused's positive urine sample after test was completed. Regulation requiring retention of sample conferred substantive right upon accused. Conviction set aside.

(2) Problems at Fort Meade Laboratory. On 24 July 1995 the commander of the Fort Meade Forensic Toxicology Drug Testing Laboratory discovered that lab technicians had violated procedures by switching quality control samples. All positive test results are still scientifically supportable, since the GC/MS tests were not affected. *See* Appendix B.

h. Good Military Character. *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985)(good military character is pertinent to drug charges against an accused as it may generate reasonable doubt in fact finder's mind.

2. Defense Requested Tests.

a. Tests for EME metabolite of cocaine.

(1) The government is not required to perform test for EME metabolite requested by defense where sample tested positive for BZE and chain of custody is not contested. *United States v. Metcalf*, 34 M.J. 1056 (A.F.C.M.R. 1992); *United States v. Pabon*, No. 29878 (A.F.C.M.R. 25 Mar. 1994), *aff'd* 42 M.J. 404 (1995).

(2) Positive test result for BZE (metabolite tested for within DOD) is sufficient to support conviction for wrongful use of cocaine; test for EME metabolite unnecessary. *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992).

(3) If tests for BZE and EME metabolites conflict, results may be insufficient to support conviction for wrongful use of cocaine. *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991). Test results inadequate where test for BZE was positive and test for EME was negative.

b. Tests for contaminants. *United States v. Mosley*, 42 M.J. 300 (1995). Military judge did not abuse his discretion by ordering retest of accused urine sample for BZE, EME and raw cocaine. Such testes fall into a "middle ground" where military judge may not be required to order test, but does not abuse his discretion if he does.

c. Blood tests and DNA tests. *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994). Military judge did not abuse discretion in denying defense request for secretor test to show accused was not source of positive sample where defense was unable to show discrepancies in collection or testing of sample.

d. Polygraphs. *United States v. Scheffer*, 118 S.Ct. 1261 (1998). Per se rule against admission of polygraph evidence (Mil. R. Evid. 707) in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense to charge that he had knowingly used methamphetamine. Per se rule serves several legitimate interests, such as ensuring that only reliable evidence is introduced at trial. *See also United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994) (Mil. R. Evid. 707 is unconstitutional), *reversed*, No. 945006 (Ct. App. Armed Forces, 29 Sep. 1995) (accused waived issue of admissibility of polygraph because he did not testify).

e. Hair.

(1) *United States v. Bush*, 47 M.J. 305(C.A.A.F. 1997) Accused was convicted of use of cocaine. The Court held that mass-spectrometry hair analysis evidence was sufficiently reliable to be admitted into evidence in court-martial to establish cocaine use, even though there was some disagreement between experts about the procedure.

(2) *United States v. Nimmer*, 43 M.J. 252 (1995). Military judge precluded defense from introducing negative hair test results, because the test would not have ruled out a one-time use of cocaine. Case remanded for relitigation of this issue using the proper standard of *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) and *Daubert v. Merrell Dow Pharmeceuticals, Inc.*, 113 S.Ct. 2786 (1993).

(3) *See* Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10.

3. Experts.

a. Defense consultants. *United States v. Kelly*, 39 M.J. 235 (C.M.A. 1994). Defense counsel did not demonstrate necessity of presence of defense urinalysis consultant at trial where he had telephonic access to expert consultant and did not identify any irregularity in test.

b. Expert witnesses. *United States v. George*, 40 M.J. 540 (ACMR 1994). Military judge improperly precluded defense expert from testifying that the presence of cocaine on everyday objects may have led to contamination of the urine sample.

c. Choice of Experts. *United States v. Short*, 50 M.J. 370 (1999). Accused not entitled to independent, non-government expert unless there is a showing that the accused's case is not "the usual case."

4. Use of Negative Urinalysis Results.

a. Negative test results are generally not admissible. *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994). Judge did not abuse discretion by excluding defense evidence of urinalysis test which was negative for the presence of marihuana three days after last charged use of marihuana. Admission of test results would have been too confusing. Admissibility of negative test results is based on Mil. R. Evid., not DoD and service regulations.

b. The defense may use negative test results only if relevant to the charged use. *United States v. Baker*, No. 28887 (A.F.C.M.R. 30 Nov. 1993). The military judge properly excluded evidence that the accused gave a urine sample which tested negative for use of illegal drugs where the sample was given over a month outside the charged period. The defense failed to show the relevance of the negative test.

5. After *United States v. Campbell,* 50 M.J. 154 (1999), *supplemented on reconsideration*, 52 M.J. 386 (2000), the best defense may be a good offense. Raising the bar for the government has opened the door for defense to be successful in attacking the government's case primarily on the second prong of *Campbell*. *See United States v. Barnes*, 53 M.J. 624 (N.M. Ct. Crim. App. 2000); *United States v. Adams*, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

6. See generally Impallaria, An Outline Approach to Defending Urinalysis Cases, ARMY LAW., May 1988, at 27, and Masterton and Sturdivant, Urinalysis Administrative Separation Boards in Reserve Components, ARMY LAW., Apr. 1995, at 3.

VIII. EXCLUSIONARY RULE AND ITS EXCEPTIONS.

A. The Exclusionary Rule.

1. Judicially created rule. Evidence obtained directly or indirectly through illegal government conduct is inadmissible. *Weeks v. United States*, 232 U.S. 383 (1914); *Nardone v. United States*, 308 U.S. 338 (1939); *Mapp v. Ohio*, 376 U.S. 643 (1961) (the exclusionary rule is a procedural rule that has no bearing on guilt, only on respect for "dignity" or "fairness").

2. Mil. R. Evid. 311(a). Evidence obtained as a result of an unlawful search or seizure made by a person acting in a government capacity is inadmissible against the accused.

3. Violation of regulations does not mandate exclusion.

a. Urinalysis regulations.

(1) *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). Deviation from Coast Guard urinalysis regulation did not make urine sample inadmissible.

(2) *But see United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Gross deviations from urinalysis regulation allow exclusion of positive test results.

b. Financial privacy regulations. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). Failure to comply with federal statute and regulation requiring notice before obtaining bank records did not mandate exclusion of records.

B. Exception: Good Faith.

1. General rule. Evidence is admissible when obtained by police relying in good faith on facially valid warrant that later is found to lacking probable cause or otherwise defective.

a. *United States v. Leon*, 468 U.S. 897 (1984). Exclusionary rule was inapplicable even though magistrate erred and issued warrant based on anonymous tipster's information which amounted to less than probable cause.

b. Rationale. Primary purpose of exclusionary rule is to deter police misconduct; rule should not apply where there has been no police misconduct. There is no need to deter a magistrate's conduct.

2. Limitations. *United States v. Leon*, 468 U.S. 897 (1984). Good faith exception does not apply, even if there is a search warrant, where:

a. Police or affiant provide deliberately or recklessly false information to the magistrate (bad faith by police);

b. Magistrate abandons his judicial role and is not neutral and detached (rubber-stamp magistrate);

c. Probable cause is so obviously lacking to make police belief in the warrant unreasonable (straight face test);

d. The place or things to be searched are so clearly misidentified that police cannot presume them to be valid (glaring technical deficiencies).

3. Mil. R. Evid. 311(b)(3): Evidence obtained from an unlawful search or seizure may be used if:

a. "competent individual" authorized search or seizure;

b. individual issuing authorization had "a substantial basis" to find probable cause;

c. official executing authorization objectively relied in "good faith" on the authorization.

4. Good faith exception applies to searches authorized by a commander. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). Good faith exception applied to allow admission of ration cards discovered during search authorized by accused's commander.

5. The good faith exception applies to more than just "probable cause" determinations; it may also save a search authorization where the commander who authorized the search did not have control over the area searched.

a. On-post searches. *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). The good faith exception applied where a commander had a good faith reasonable belief that he could authorize a search of an auto in a dining facility parking lot, even though the commander may not have had authority over the parking lot.

b. Off-post searches overseas. *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). The good faith exception applied to search of accused's off-post apartment overseas even though commander did not have authority to authorize search because accused was not in his unit.

6. The good faith exception may apply even when a warrant has been quashed. *Arizona v. Evans*, 115 S. Ct. 1185 (1995). The exclusionary rule does not require suppression of evidence seized incident to an arrest based on an outstanding arrest warrant in a police computer, despite the fact the warrant was quashed 17 days earlier. Court personnel were responsible for the inaccurate computer record, because they failed to report that the warrant had been quashed.

7. *But see United States v. Maxwell*, 45 M.J. 406 (1996). Anticipatory search of e-mail by online company, at behest of government and prior to service of warrant shows "no reliance on the language of the warrant for the scope of the search." Thus, good faith is not applicable. Evidence suppressed.

C. Exception: Independent Source.

1. General rule. Evidence discovered through a source independent of the illegality is admissible.

a. *Murray v. United States*, 487 U.S. 533 (1988). Police illegally entered warehouse without warrant and saw marihuana. Police left warehouse without disturbing evidence and obtained warrant without telling judge about earlier illegal entry. Evidence was admissible because it was obtained with warrant untainted by initial illegality.

b. Rationale. Police should not be put in worse position than they would have been in absent their improper conduct.

2. Evidence obtained through independent and voluntary acts of third parties. *United States v. Fogg*, 52 M.J. 144 (1999).

3. Search based on both legally and illegally obtained evidence. *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993). Independent source doctrine applied where affidavit supporting search authorization contained both legally and illegally obtained evidence. After excising illegal information, court found remaining information sufficient to establish probable cause.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

D. Exception: Inevitable Discovery.

1. General rule. Illegally obtained evidence is admissible if it inevitably would have been discovered through independent, lawful means.

   a. *Nix v. Williams*, 467 U.S. 431 (1984). Accused directed police to murder victim's body after illegal interrogation. Body was admissible because it would have inevitably been discovered; a systematic search of the area where the body was found was being conducted by 200 volunteers.

   b. Rationale. The police should not benefit from illegality, but should also not be put in worse position.

2. Mil. R. Evid. 311(b)(2). Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

3. *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). Illegal search of train station locker and seizure of hashish, which exceeded authority to wait for accused to open locker and then apprehend him, did not so taint apprehension of accused as to make subsequent seizure of drugs after accused opened locker inadmissible. Drugs would have been inevitably discovered.

4. *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985). Evidence found in trunk of accused's car admissible despite invalid consent to search. Evidence inevitably would have been discovered as police had probable cause and were in process of getting search authorization.

5. *United States v. Kalisky*, 37 M.J. 105 (C.M.A. 1993). Inevitable discovery doctrine should be applied to witness testimony only if prosecution establishes witness is testifying of her own free will, independent of illegal search or seizure. Testimony of accused's partner in sodomy should have been suppressed where she testified against accused only after police witnessed sodomy during illegal search.

6. Distinguish between "independent source" and "inevitable discovery."

   a. Independent source deals with *facts*. Did police in fact find the evidence independently of the illegality?

   b. Inevitable discovery deals with hypotheticals. *Would* the police have found the evidence independently of the illegal means?

E. Exception: Attenuation of Taint.

1. General rule. Evidence that would not have been found *but for* official misconduct is admissible if the causal connection between the illegal act and the finding of the evidence is so attenuated as to purge that evidence of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 484-87 (1963). Accused's unlawful arrest did not taint his subsequent statement where statement was made after his arraignment, release on own recognizance, and voluntary return to the police station several days later.

2. *United States v. Rengel*, 15 M.J. 1077 (N.M.C.M.R. 1983). Even if accused was illegally apprehended, later seizure of LSD from him was attenuated because he had left the area and was trying to get rid of drugs at the time of the seizure.

3. *But see Taylor v. Alabama*, 457 U.S. 687, 691 (1982). Defendant was arrested without probable cause, repeatedly questioned by police who took fingerprints and put him in line-up without counsel present. Confession was obtained six hours after arrest was inadmissible.

4. Mil. R. Evid. 311(e)(2). Evidence challenged as derived from an illegal search or seizure may be admitted if the military judge finds by a preponderance of evidence that it was not obtained as a result of the unlawful search or seizure.

F. Exception: Impeachment.

1. Illegally obtained evidence may be used to impeach accused's in-court testimony on direct examination or to impeach answers to questions on cross-examination. *United States v. Havens*, 44 U.S. 962 (1980). Defendant's testimony on direct that he did not know his luggage had T-shirt used for smuggling cocaine allowed admissibility of illegally obtained T-shirt on cross-examination to impeach defendant's credibility. *See also Walder v. United States*, 347 U.S. 62 (1954).

2. Mil. R. Evid. 311(b)(1). Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

IX. CONCLUSION.

X. APPENDIX A: SECTION III DISCLOSURE

UNITED STATES	)	
	)	Fort Blank, Missouri
v.	)	
	)	DISCLOSURE OF
William Green	)	SECTION III EVIDENCE
Private (E-1), U.S. Army	)	
A Co., 1st Bn, 13th Inf.	)	22 July 200X
8th Inf. Div. (Mech)	)	

Pursuant to Section III of the Military Rules of Evidence, the defense is hereby notified:

1. Rule 304(d)(1). There are (no) relevant statements, oral or written, by the accused in this case, presently known to the trial counsel (and they are appended hereto as enclosure ___).

2. Rule 311(d)(1). There is (no) evidence seized from the person or property of the accused or believed to be owned by the accused that the prosecution intends to offer into evidence against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____).

3. Rule 321(d)(1). There is (no) evidence of a prior identification of the accused at a lineup or other identification process which the prosecution intends to offer against the accused at trial (and it is described with particularity in enclosure ____) (and it is described as follows: _____ _____).

A copy of this disclosure has been provided to the military judge.

PETER MUSHMAN
CPT, JA
Trial Counsel

XI. APPENDIX B: GUIDE TO ARTICULATE PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a *reasonable belief*, *based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. Witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a. If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b. If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply:

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply:

1. Witness is a good, honest soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. Witness has given reliable information before; he has a good track record (CID may have records).

3. Witness has no reason to lie.

4. Witness has truthful demeanor.

5. Witness made statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. Witness made admission against own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.